

EMPLOYER STATUS DETERMINATION ON RECONSIDERATION  
RAIL TOURS, INC.

This is the decision of the Railroad Retirement Board regarding the request for reconsideration of the Board's decision holding Rail Tours, Inc., to be an employer under the Railroad Retirement and Railroad Unemployment Insurance Acts. In a decision dated January 30, 1995, the Board held that Rail Tours is an employer by reason of its being under common control with a carrier and its performing services in connection with rail transportation.

In its request for reconsideration, Rail Investments argues that it is not under "common control." In the request for reconsideration, counsel for Rail Tours states that it is a corporation owned entirely by Mr. John C. Larkin and that Mr. Larkin is the President and only officer of Rail Tours. The Escanaba & Lake Superior Railroad Company is a corporation owned by Mr. Wade W. Larkin, Mr. John C. Larkin, and Ms. Avis K. Larkin. It is controlled by a voting trust agreement of which Mr. Wade W. Larkin and Mr. John C. Larkin each control 49 percent and Ms. Avis K. Larkin controls 2 percent. Mr. John C. Larkin is the President of Rail Tours.

Section 202.4 of the Board's regulations provides that:

A company or person is controlled by one or more carriers, whenever there exists in one or more such carriers the right or power by any means, method or circumstance, irrespective of stock ownership to direct, either directly or indirectly, the policies and business of such a company or person and in any case in which a carrier is in fact exercising direction of the policies and business of such a company or person.

Section 202.5 of the Board's regulations provides that:

A company or person is under common control with a carrier, whenever the control (as the term is used in §202.4) of such company or person is in the same person, persons, or company as that by which such carrier is controlled.

Rail Tours contends that according to the decision in Union Pacific Corporation v. United States, 5 F. 3d 523 (Fed. Cir. 1993), there is no common control in this case. A majority of the Board does not agree with Rail Tours' reading of that case. Union Pacific held that a parent company was not under common control with its subsidiary. In the view of the majority, Union Pacific did not hold that companies could not be under common

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control by reason of common ownership or management. In the instant case Rail Tours and the Escanaba and Lake Superior Railroad Company are not parent and subsidiary but have common management in that the same person has the right to control the management and operations of both companies. Mr. John C. Larkin is the sole owner and President of Rail Tours and is President of the Escanaba and Lake Superior Railroad Company. He is also owns a substantial interest in the latter company, which is entirely owned by him and his parents. It is the opinion of the majority that the evidence establishes that both Rail Tours and the Escanaba and Lake Superior Railroad are under control of the same persons within the meaning of sections 202.4 and 202.5 of the Board's regulations. Accordingly, it is the determination of a majority of the Board that Rail Tours is under common control with a covered rail carrier employer, the Escanaba and Lake Superior Railroad Company.

Rail Tours does not challenge the Board's finding in its January 30, 1995, decision that Rail Tours performs a service in connection with rail transportation. The Board agrees with the earlier decision that Rail Tours does provide a service in connection with rail transportation.

The previous decision of the Board is affirmed by a majority of the Board.

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Glen L. Bower

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V. M. Speakman, Jr.

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Jerome F. Kever **(Dissenting)**

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Railtour.cov

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5 February 1996

Steve -

In the coverage decision it is stated that the three Larkins own Rail Tours. I could not find support for this statement in the file material. There is an OIG report which states that Rail Tours is owned by two of the Larkins (this statement is based on information provided by a "railroad official"). In the request for reconsideration, counsel states that Rail Tours is owned by John C. Larkin.

There is a 1993 letter in file from ESH inquiring about the ownership interest in Rail Tours. There is no reply in file.

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Re. Railtours, Inc.

I spoke with Michael C. Durney, 202-296-3460, counsel for Railtours. He advised that Wade Larkin & Avis Larkin are married & that John Larkin is their adult son.

Bureau of Law

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Steve -

When I spoke with Mr. Durney he said that he had received confirmation of his request for reconsideration regarding Rail Investments & I told him that he would receive confirmation of the request regarding Rail Tours. He said that he had not received confirmation of the receipt of his request for reconsideration regarding Escanaba Services, so I attach a draft letter advising of the Board's receipt of that request.

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